

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND

Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:
JOHNSON ENTERPRISES
Applicant

Wes Guckert
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Philip E. Perrine
Stephen Tawes

For the Application

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Attorney for the Applicant

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Environmental Planning Division
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Community-Based Planning Division

Testimony by Public Agency
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Homeowners Association
Mitzi Kosciulek
Liz Lawrence, Willow Ridge Homeowners
Association
Michael Lehrhoff, Co-President, Orchard
Hills Homeowners Association
Philip Martinez
Marjorie Murphy
Paul Murphy
Larry Regan

In Opposition to the Application

Martin Klauber, Esquire, People's Counsel
In Opposition to the Application

Before: Françoise M. Carrier, Hearing Examiner

Zoning Application No. G-789

HEARING EXAMINER'S REPORT AND RECOMMENDATION

I. SUMMARY

This application seeks rezoning based on alleged mistake in the last comprehensive zoning of the subject site. Property owned by the Applicant was downzoned from R-200 to RE-2C in 1986, to implement environmental protection recommendations stated in the *Approved and Adopted 1985 Gaithersburg Master Plan*. The Applicant now seeks to return to R-200 zoning on a portion of its property, to allow increased density in a planned single-family residential development (a maximum of 91 units v. 24 under current zoning). The property is located near the intersection of Darnestown and Quince Orchard Roads in Gaithersburg, next to Smokey Glen Farm. The mistake alleged is that the District Council relied on environmental data in the relevant master plan that was incorrect, and therefore labored under a misapprehension concerning environmental conditions on the property.

The Applicant bears a heavy burden to overcome the legal presumption that all comprehensive rezoning is accurate. In this case, the Applicant has not met its burden. The evidence of record does not support a finding of mistake in the most recent comprehensive rezoning of the subject site. Accordingly, I recommend denial of this application.

II. STATEMENT OF THE CASE

Application No. G-789, filed May 12, 1999, requests reclassification from the RE-2C (Residential estate, two-acre cluster) Zone to the R-200 (Residential, One-family detached) Zone of a total of 61.589 acres located at the northwest quadrant of Quince Orchard Boulevard and Darnestown Road, Gaithersburg, in the 6th Election District.

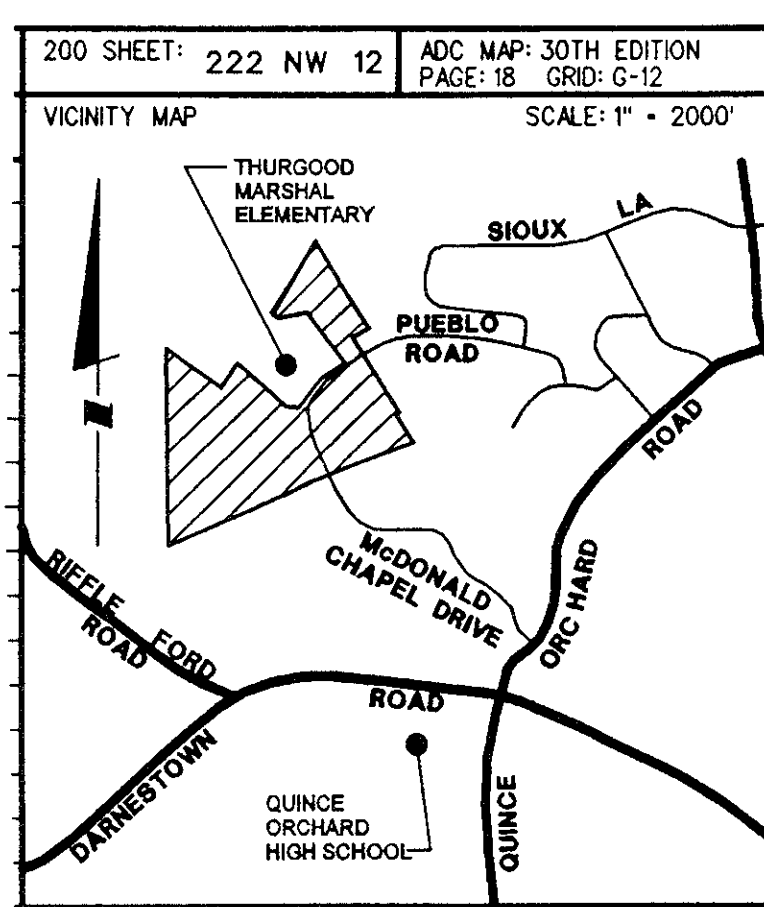
The Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) initially reviewed the application and, in a report dated October 12, 2001, recommended denial. Four members of the Planning Board considered the application on October 25, 2001, and unanimously recommended denial. A public hearing was conducted on November 6 and 7, 2001, and evidence was submitted both in support of and in opposition to the application. The People's Counsel participated in opposition to the application. In view of the significant amount of evidence presented by the Applicant at the hearing that was not included in the Applicant's pre-hearing statement or pre-filed evidence, the Hearing Examiner requested briefing by all parties on the new evidence, particularly pertaining to soil quality. Technical Staff, the People's Counsel, and the Applicant subsequently made written submissions. The record closed on January 13, 2002.

III. FINDINGS OF FACT

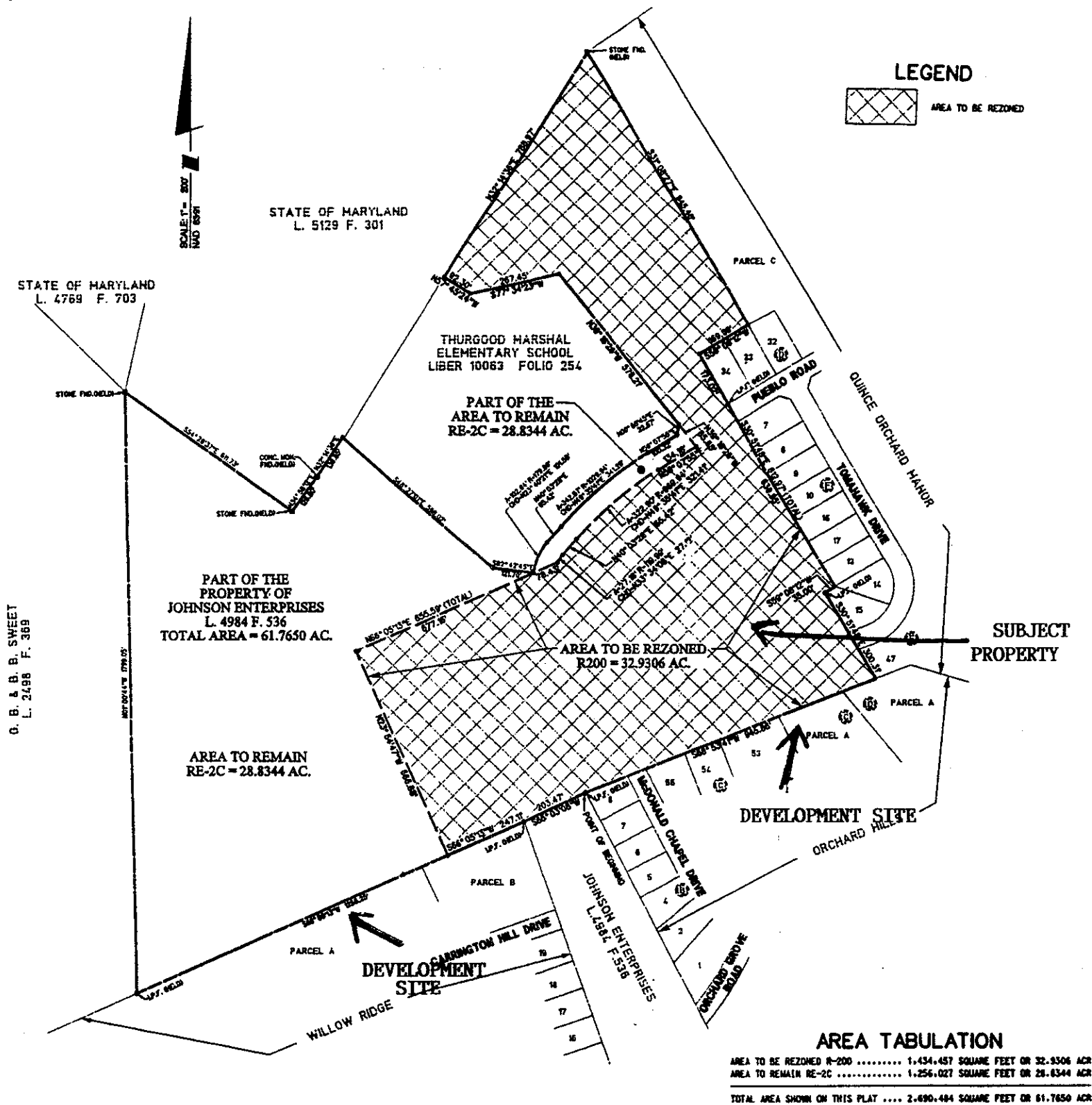
For the convenience of the reader, the facts are grouped by subject matter. Conflicts in the evidence generally are resolved under the preponderance of evidence test. Evidence intended to demonstrate mistake in zoning is subject to the "strong evidence" test necessary to rebut the presumption that all comprehensive zoning is correct.

A. Subject Property

The property that the Applicant seeks to rezone (the "Subject Property") is located northwest of the intersection of Darnestown Road (MD Route 28) and Quince Orchard Road (MD Route 124). It is irregular in shape and contains approximately 33 acres of land. The general shape and location of the Subject Property are depicted on the following page (excerpted from Ex. 55a).

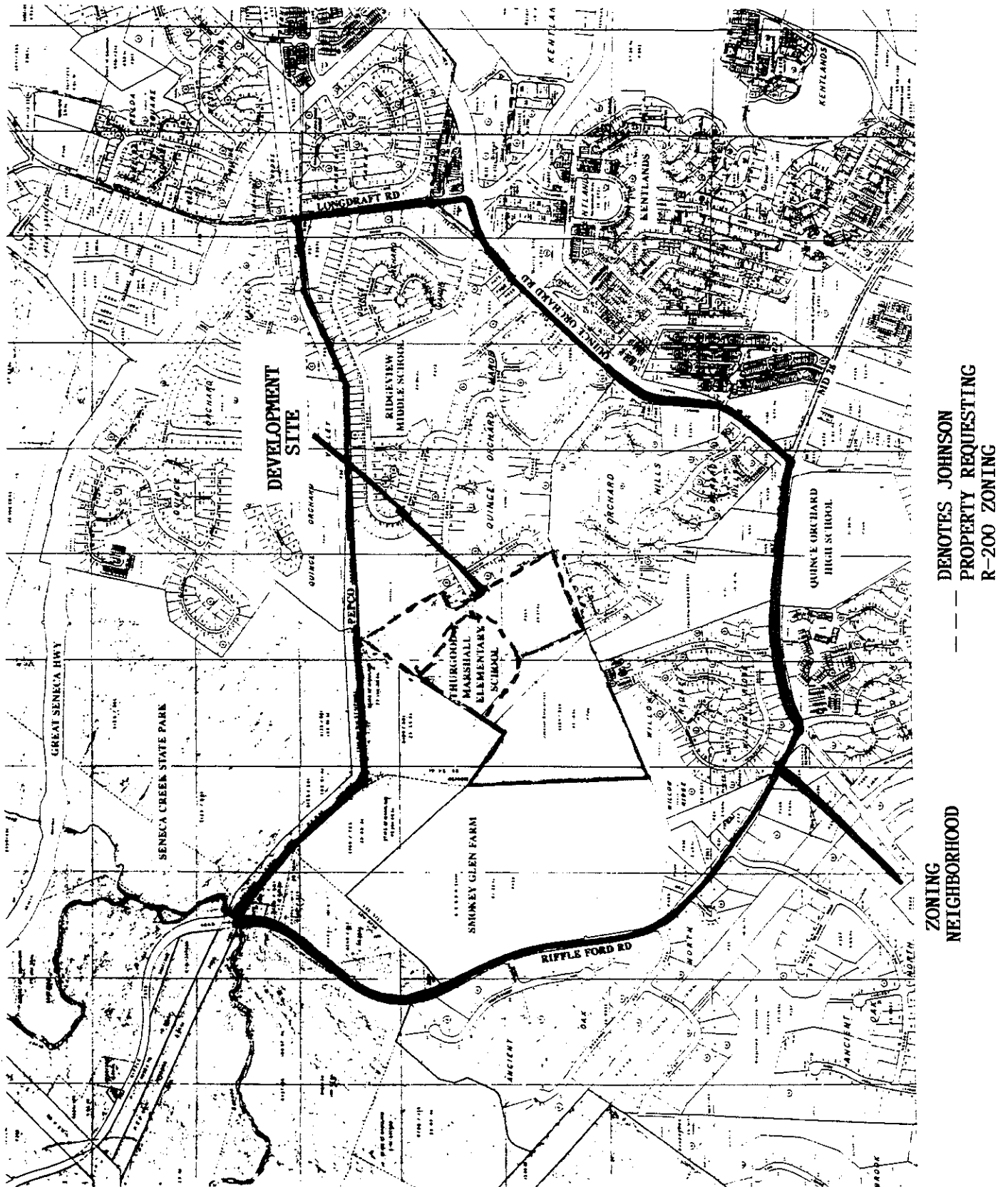


The Subject Property is part of a single tax parcel owned by the Applicant, Johnson Enterprises, which measures approximately 82 acres (the "Johnson Property"). The Applicant has contracted to sell approximately 62 acres of the Johnson Property, including the Subject Property, to Winchester Homes, which intends to develop this 62-acre area (the "Development Site") as a single-family residential subdivision. The original application for reclassification in this case sought to reclassify the entire Development Site under the R-200 Zone. The application has since been amended to request reclassification only for the 33-acre portion of the Development Site that comprises the Subject Property. The Subject Property and the Development Site are outlined on the identification plat reproduced on the next page (Ex. 55a).

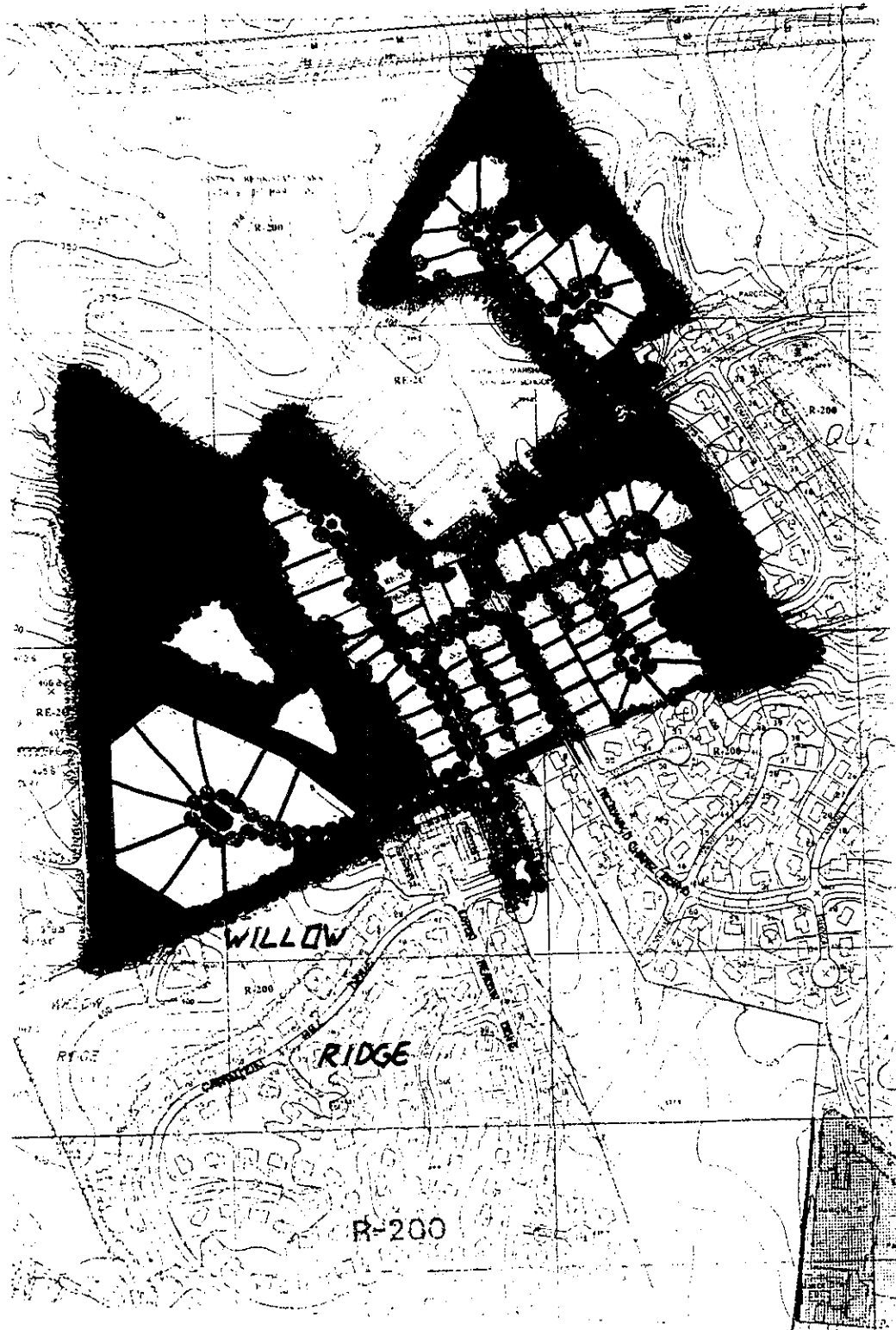


JOHNSON PROPERTY
REVISED IDENTIFICATION PLAT

The Development Site and the Johnson Property are identified on the neighborhood map reproduced below (Ex. 66).



A non-binding conceptual plan for the Development Site, assuming the present zoning request is granted, is depicted below. The following page displays a preliminary plan (pending before the Planning Board at the time of hearing) submitted by the Applicant for development of the full Development Site under the existing RE-2C zoning.



NON-BINDING ILLUSTRATIVE PLAN: COMBINED RE-2C/R-200 ZONING

contains significant forest area, steep slopes, a flowing stream, and two natural ponds. *See* approved Natural Resources Inventory/Forest Stand Delineation (Ex. 72).

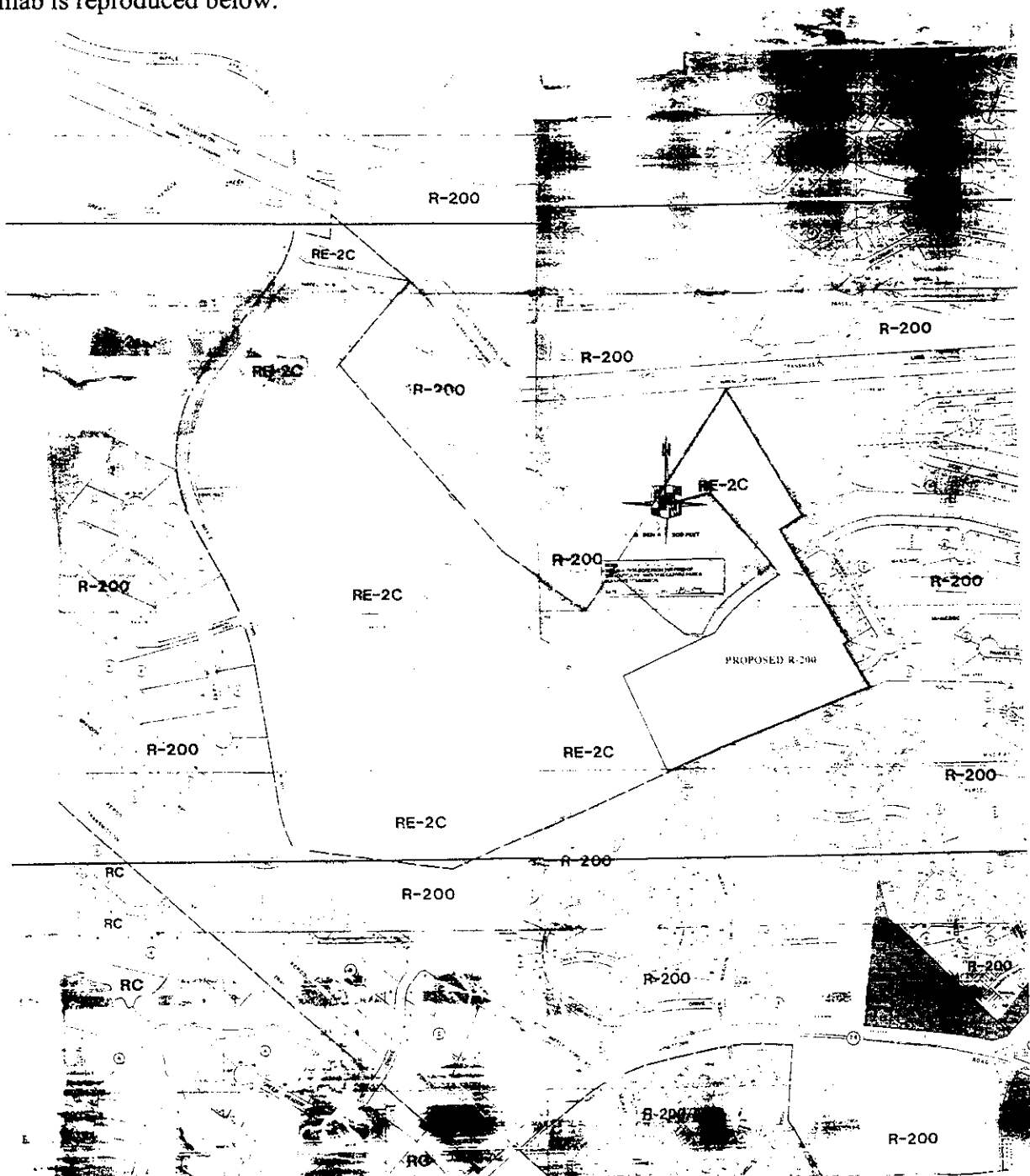
McDonald Chapel Drive cuts through the Subject Property on an easement to provide access to Thurgood Marshall Elementary School, which is surrounded by the Subject Property on two sides. Access to the Subject Property currently exists via McDonald Chapel Drive, which connects to Quince Orchard Road to the southeast and Pueblo Road to the northeast. Pueblo Road connects to other local roads that eventually connect to Longdraft Road and Great Seneca Highway. The developer's present plans include creating an additional means of access by constructing a roadway through the Subject Property that would connect to Carrington Hill Drive, which is currently an internal roadway in the Willow Ridge subdivision to the south.

B. Zoning Neighborhood

The R-200 Zone is Euclidean in nature and its evaluation requires delineation of a zoning neighborhood. Technical Staff and the Applicant defined the neighborhood as bounded on the north by Pepco transmission lines; on the east by Quince Orchard Road and Longdraft Road; on the south by Darnestown Road; and on the west by Riffle Ford Road. No other party having objected to this delineation, the Hearing Examiner will adopt it for purposes of evaluating the requested reclassification. The zoning neighborhood is identified on the neighborhood map reproduced above on page 5.

The neighborhood is predominantly residential in character, although it contains some commercial and institutional uses. Adjoining the Subject Property to the north are Seneca Creek State Park and the Thurgood Marshall Elementary School. Adjoining to the east and south are three subdivisions located in the R-200 Zone: Quince Orchard Manor to the east, Orchard Hills to the southeast, and Willow Ridge to the southwest. Ridgeview Middle School is located within Quince Orchard Manor, a short distance from the Subject Property. Adjoining the Subject Property to the west is the remainder of the Development Site, which measures roughly 29 acres and is not included in this

zoning application. Winchester Homes seeks to develop this area with single-family homes under its existing RE-2C zoning, in conjunction with developing the Subject Property under the proposed R-200 Zone. The portion of the Johnson Property that is not included in the Development Site is vacant, and adjoins the Subject Property to the south, between the borders of Willow Ridge and Orchard Hills. Smokey Glen Farm (a private recreation area offering outdoor social events) adjoins the Development Site to the west. These features can be seen on the neighborhood map provided on page 5. The area zoning map is reproduced below.



Other uses in the neighborhood include a small commercial center fronting on Darnestown Road in the C-1 Zone, which contains a Safeway grocery store, a video store, and a dry cleaner. Johnson's Flower and Garden Center and an Amoco service station are located adjacent to this center, also in the C-1 Zone.

C. Zoning History

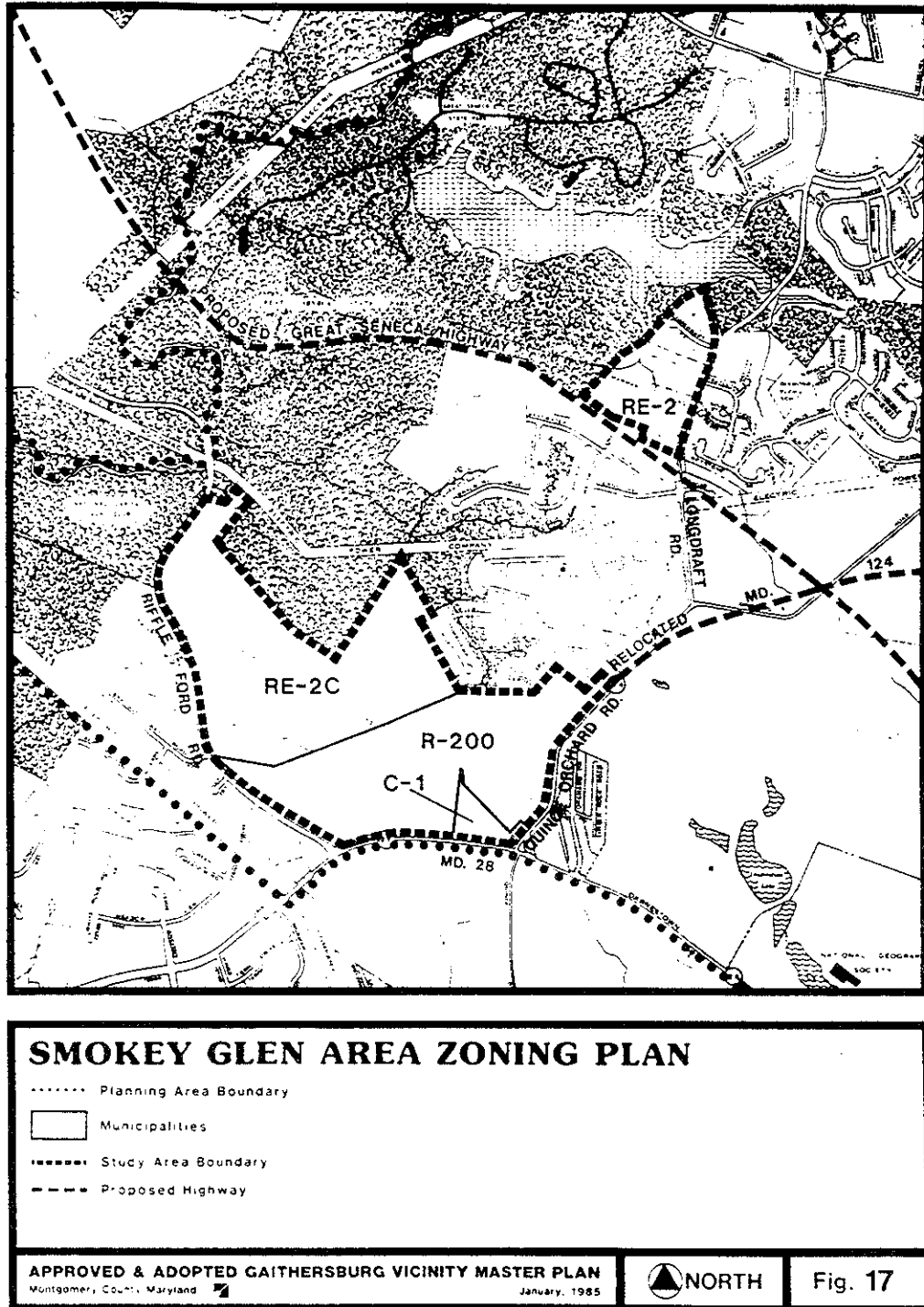
The planning and zoning history of the area plays an important role in the analysis of this application, because the requested reclassification is premised on the contention that a mistake occurred when the Johnson Property was downzoned from R-200 to RE-2C in 1986. Accordingly, the factual premises that supported the downzoning of the Johnson Property will be evaluated in some detail.

The Johnson Property was zoned R-R in a 1958 County-wide comprehensive rezoning. In 1974, Gaithersburg Vicinity Sectional Map Amendment ("SMA") F-805 confirmed R-200 (formerly R-R) zoning. The *Approved and Adopted 1985 Gaithersburg Vicinity Master Plan* ("Adopted Master Plan") recommended reclassifying the Johnson Property and Smokey Glen Farm under the RE-2C Zone. That recommendation was implemented in 1986 by SMA G-502. The Applicant now contends that the 1986 rezoning was founded on a mistake in the description of environmental conditions on the Johnson Property provided to the District Council. The Applicant maintains that if accurate factual information had been presented to the District Council, only the Smokey Glen Farm would have been reclassified under the RE-2C Zone, and the Johnson Property would have remained in the R-200 Zone.

1. Adopted and Approved Master Plan: Accuracy of Figure 18

The Adopted Master Plan included the Johnson Property in the Smokey Glen Study Area, which is depicted on the Zoning Plan shown on the following page, from the Adopted Master Plan (Hearing Examiner Ex. 95 at 51).¹

¹ The complete Smokey Glen Study Area contained two discontinuous areas. The larger of the two was comprised of the Johnson Property, the Smokey Glen Farm, the land area fronting on Route 28 that is now occupied by Willow Ridge and Orchard Hills, and the small commercial area near the



The text of the Adopted Master Plan discussed the Smokey Glen Study Area in two locations: (1) the “Plan Highlights” at the very beginning of the plan; and (2) a more detailed discussion

intersection of Darnestown and Quince Orchard Roads. The smaller of the two areas that made up the Smokey Glen Study Area was located immediately north of present-day Great Seneca Highway, west of Longdraft Road and outside the zoning neighborhood for this case. All future references to the Smokey Glen Study Area in this report shall refer only to the larger area, located within the relevant zoning neighborhood, unless clearly specified otherwise.

in the "Land Use and Zoning Recommendations" section that formed the bulk of the plan. The discussion of the Smokey Glen Study Area in the Plan Highlights section is reproduced below:

This is an environmentally sensitive area north of MD 28 near Seneca Creek State Park. The Plan recommends that:

- *The area located northeast of Riffle Ford Road and adjacent to Seneca Creek State Park be shown for an average density of one unit per two acres. Clustering of residential units will be required to protect the environmentally sensitive area.*

** * **

- *The remaining areas (not considered environmentally sensitive) be confirmed as half-acre residential zoning. [Gaithersburg Vicinity Master Plan, p. 4]*

The Land Use and Zoning Recommendations section contained the following language regarding proposed zoning in the Smokey Glen Study Area:

This Plan confirms the R-200 and C-1 Zones on two parcels fronting MD 28. The character of these parcels, 163 acres and 12 acres respectively, has already been determined by existing or proposed development. The Plan recommends additional C-1 zoning (6,300 square feet) for the parcel fronting MD 28 near Quince Orchard Road, adjacent to Suburban Trust Drive-In Bank. This would provide for improved traffic circulation and parking for the bank.

This Plan confirms residential land use for two other areas but recommends a lower density (one home per 2 acres) to reflect environmental concerns and to respect environmentally sensitive areas. (See figure 18.)

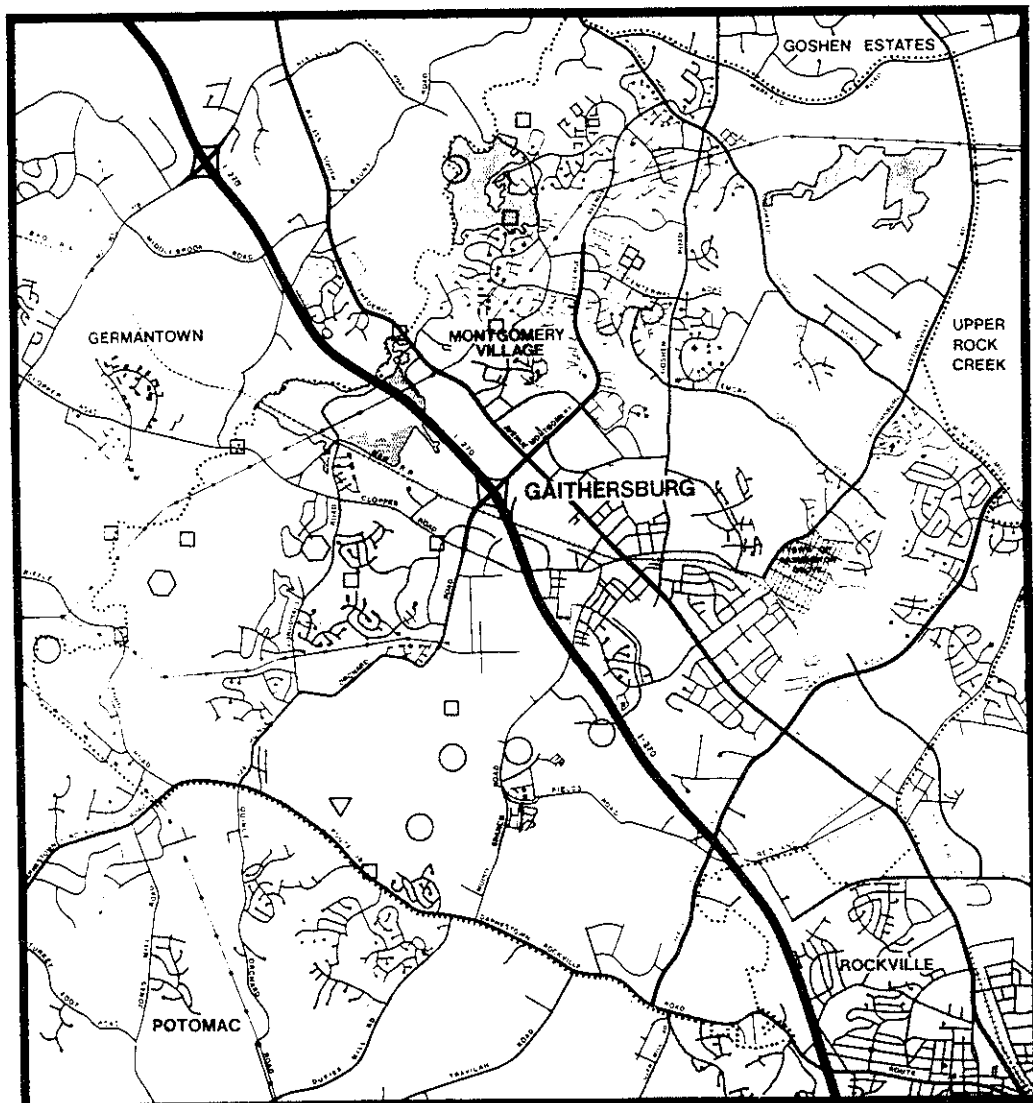
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The second area proposed for lowered density is located northeast of Riffle Ford Road and adjacent to Seneca Creek State Park. It contains the Smokey Glen Farm and generally vacant land interspersed with scattered single-family homes. Since 1958, Smokey Glen Farm has functioned as a private recreation area, providing outdoor parties for large groups. This area contains a significant amount of environmentally sensitive land with floodplains, steep slopes, and erodible soils. Several tributaries of Great Seneca Creek are located in this area.

The Plan recommends reducing the permitted density to one unit per two acres under the RE-2C Zone. Clustering is strongly

encouraged to protect the environmentally sensitive areas. The western portion of this area probably could be served by a gravity sewer line parallel to the existing force main easement. [Gaithersburg Master Plan, page 50.]

Thus, the Johnson Property was downzoned from R-200 to RE-2C "to reflect environmental concerns and to respect environmentally sensitive areas." Environmentally Sensitive Areas in the Gaithersburg Planning Area as a whole, such as wildlife habitat and mature woodlands, were depicted on Figure 32 of the Adopted Master Plan (Hearing Examiner Ex. 95 at 98), presented below.



ENVIRONMENTALLY SENSITIVE AREAS

..... Planning Area Boundary

□ Municipalities

SOURCE:
Seneca Creek Muddy Branch Functional Plan
And Associated Inventories

□ Fish Sampling Stations

○ Wildlife Habitat

▽ Water Fowl Sanctuary

○ Unique Vegetation

■ Mature Woodlands

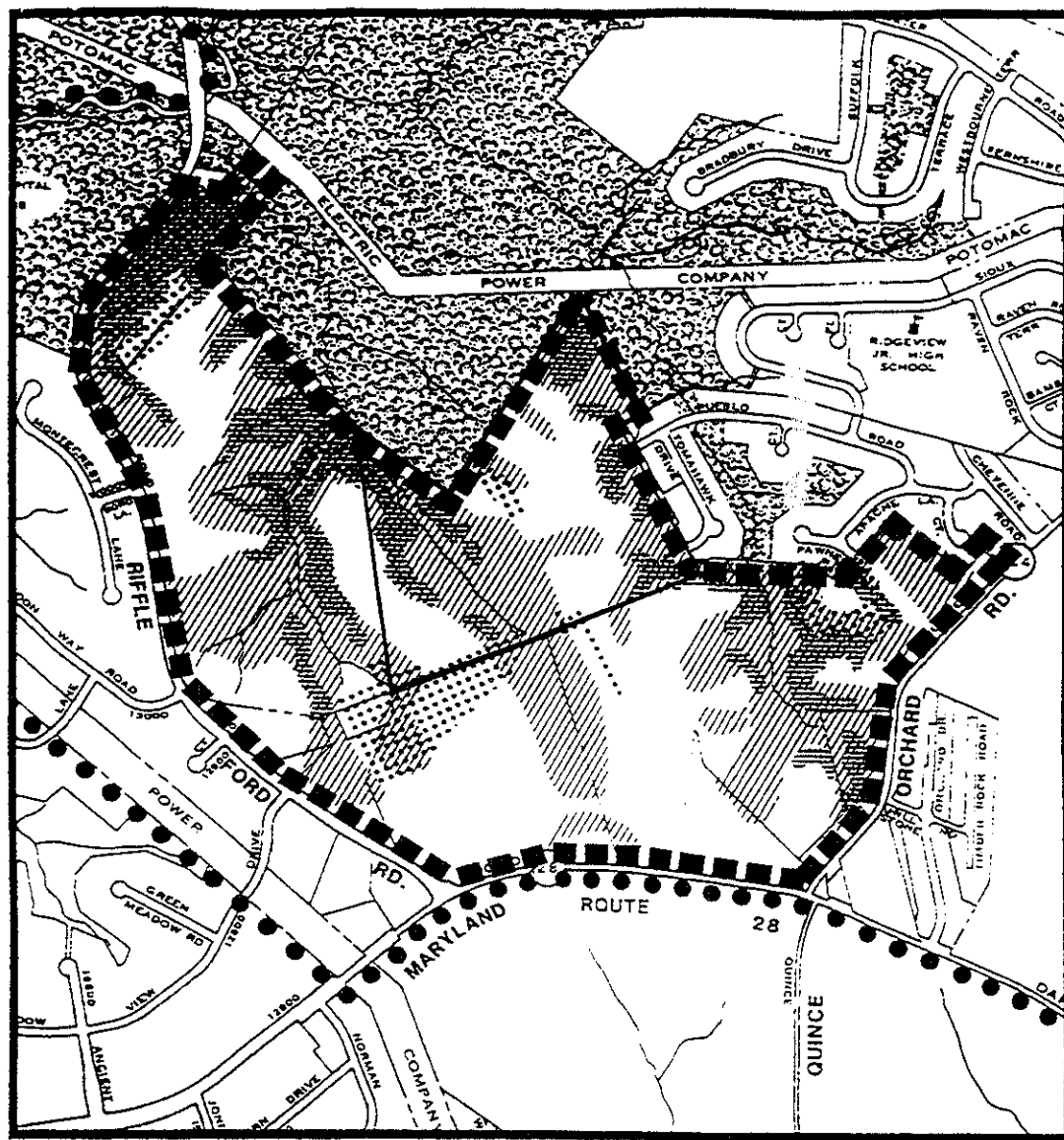
APPROVED & ADOPTED GAITHERSBURG VICINITY MASTER PLAN
Montgomery County Maryland January, 1985



Fig. 32

A more detailed depiction of environmentally sensitive areas within the Smokey Glen Study Area was presented on Figure 18 of the Adopted Master Plan (Hearing Examiner Ex. 95 at 52), which is reproduced below.

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SMOKEY GLEN AREA- ENVIRONMENTALLY SENSITIVE AREAS

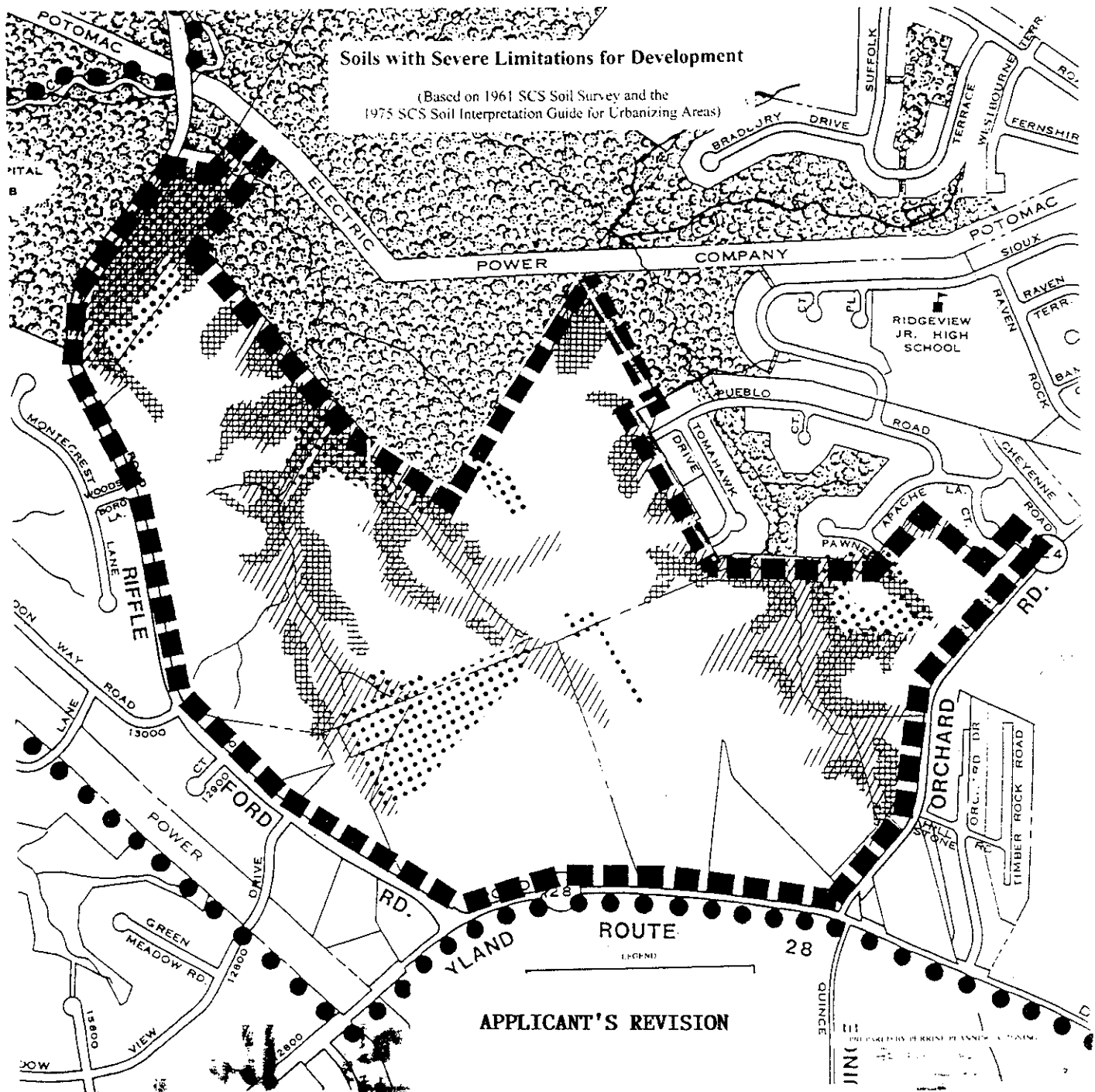
- | | |
|------------------------------------|------------------------------|
| ----- Analysis Area Boundary | ===== Steep Slopes |
| ~~~~~ Stream | Planning Area Boundary |
| Wooded Areas | |
| ////// Soils (erodible & alluvial) | |

APPROVED & ADOPTED GAITHERSBURG VICINITY MASTER PLAN
Montgomery County Maryland January 1985



Fig. 18

Figure 18 lies at the crux of the mistake alleged by the Applicant in this case. Figure 18 identifies land as environmentally sensitive if it holds streams, wooded areas, erodible and alluvial soils, or steep slopes. The Applicant contends that Figure 18 mistakenly identifies too large an area within the Johnson Property as having erodible and alluvial soils. The Applicant proposed the figure depicted below (Ex. 84) as a hypothetical revision of Figure 18 that identifies erodible and alluvial soils based on the Applicant's interpretation of relevant soil information.



Both the original Figure 18 and the Applicant's revision were based in part on soil characteristics set forth in the 1961 Soil Survey of Montgomery County (the "Soil Survey"), prepared by the United States Department of Agriculture's Soil Conservation Services (SCS) (*see* excerpts at Ex. 81b). The Soil Survey provided maps of the County identifying characteristics such as types of soil (e.g. manor silt loam, silty clay), depth, slope (e.g. 3 to 8 percent, 15 to 25 percent), and degree of erosion (moderately, severely, or very severely eroded). *See* Ex. 81b at 54, 61. It was intended to help farmers in soil management, assist engineers in selecting sites for roads and other structures, and assist county and community planners in selecting sites for urban and residential development. *See id.* at 1.

In 1975, the SCS prepared a "Soil Interpretation Guide for Urbanizing Areas" of Montgomery County (the "Guide") for use in conjunction with the Soil Survey and other soil data (*see* excerpts at Ex. 83, Ex. 100 at 4-6). The Guide was "designed for use by planning officials, engineers, builders, governmental agencies, and individuals owning or managing land" in interpreting the soils of the County "for features affecting the construction of buildings." Ex. 83 at C2. The Guide described the slope and degree of erosion (moderate, severe, very severe) of each soil type, and characterized each as having slight, moderate, or severe limitations for building construction. These characterizations can be applied to the Soil Survey maps to determine soil qualities at a given location.

The Applicant used the Guide to develop its revision of Figure 18. Specifically, the Applicant depicted soils as "environmentally sensitive" only if the Guide characterized such soils as having severe limitations for building purposes. The soils depicted as environmentally sensitive on the original Figure 18, in contrast, included soils that were characterized in the Guide as having either severe *or moderate* limitations for building purposes. The Guide offered the following definitions of these limitations (Ex. 83 at C2):

"Moderate" means that some soil properties are unfavorable but can be overcome or modified by special planning and design.

“Severe” means soil properties so unfavorable and so difficult to correct or overcome as to require major soil reclamation and special designs.

The Applicant’s planning expert, Phil Perrine, testified that it is common practice to build on soils with moderate building limitations, and that building on soil with severe limitations is avoided, but does take place where necessary. He opined that County staff who prepared the original Figure 18 either did not use the Guide, or applied it incorrectly. In his view, proper application of the Guide could lead only to the results shown on his revision of Figure 18.

Seekey Cacciatore, an environmental planner with Technical Staff, argued that Figure 18 depicts environmentally sensitive soils correctly. Staff maintains that the Guide’s characterization of soils as having moderate or severe limitations is not conclusive as to whether such soils should be considered environmentally sensitive. Rather, Staff argues that soils can be considered environmentally sensitive based on factors such as nearby slopes and degree of erosion, which clearly are elements in the Guide’s characterizations of moderate v. severe building limitations, but are not directly correlated in a fashion that is easy to generalize.²

In arguing that the original Figure 18 was incorrect, the Applicant relied heavily on Mr. Perrine’s professional opinion that the Guide could not have been used in preparing Figure 18, because if it had been used the results would have been different. The Applicant also offered into evidence pages excerpted from master plans for other areas of the County that identified soils with severe limitations for building (*see* Ex. 82); the Adopted (Gaithersburg) Master Plan did not include such a map. The Hearing Examiner is not persuaded by the Applicant’s contention that the presence of these maps in other master plans demonstrates an error in the Adopted (Gaithersburg) Master Plan. First, a

² Some soil types characterized in the Guide as having severe building limitations have steep slopes and severe erosion, while others have moderately steep slopes and moderate erosion. Some soil types characterized in the Guide as having moderate building limitations have moderately steep slopes and severe or very severe erosion, while others have steep slopes and moderate or severe erosion. *See* Ex. 83 at C3-C4.

similar map was included in a Technical Appendix to the Adopted (Gaithersburg) Master Plan. I am unwilling to make the leap of logic required to consider a planner's decision whether to include a particular map in a Technical Appendix or in the body of a proposed master plan as an "error," as opposed to a judgment concerning the importance of the information. Second, on reviewing the excerpts from other plans submitted by the Applicant, it is not obvious to me that all of the plans relied on the Soil Interpretation Guide.³

The Applicant supported its argument that the original Figure 18 was incorrect by reference to two additional planning documents (*see* Ex. 104 at 3). The first is "Staff Guidelines for the Protection of Slopes and Stream Valleys," published in March 1983 (attachment to Ex. 50). The Applicant states that this document makes no reference to erodible soils. While this observation is technically accurate, the Hearing Examiner notes that the opening sentence of the document identifies "[a]ccelerated land surface and stream channel erosion and deposition" as major problems confronting watershed development. The Guidelines note that the disturbance of steep slopes is of special concern especially adjacent or in close proximity to streams or drainage courses. Accordingly, I conclude that the March 1983 Guidelines tend to support Technical Staff's argument that the delineation of environmentally sensitive ("erodible and alluvial") soils on the original Figure 18 was accurate.

The Applicant also cited Environmental Guidelines prepared by the M-NCPPC in 1997, which suggest that under current standards, some of the soils identified as erodible or eroded in 1985 would not be characterized as such today. The Hearing Examiner finds this citation to changed technical standards unpersuasive.

³ Two of the five plans, including one prepared in 1974, before publication of the Guide, identified soils with slight, moderate, and severe constraints based using definitions different from those provided in the Guide. A third plan identified soils with severe, moderate, and slight limitations, but cited the Soil Survey rather than the Guide.

Technical Staff produced one piece of documentary evidence suggesting that the Guide was used in preparing Figure 18: a copy of the Guide bearing the name of the former staff member responsible for preparing Figure 18. This copy of the Guide shows that, at the very least, it was in the possession of the person who prepared the original Figure 18. The Hearing Examiner notes, moreover, that the title and legend on the soils map in the Technical Appendix, "Severely Limited Soils/Soils Having Severe Limitations for Heavy Construction and/or Residential Buildings with Basements" follow closely the language of the Guide, suggesting that the author of that map consulted the Guide. In addition, Mr. Perrine demonstrated graphically that the area identified in the Technical Appendix as having severely limited soils corresponded very closely to soils characterized in the Guide as having severe limitations (*see* Tr. Nov. 7, rebuttal testimony). Finally, Ms. Cacciatore of the Technical Staff offered her professional opinion that Figure 18 incorporated the information supplied in the Guide and correctly depicted environmentally sensitive soils (*see* Ex. 100 at 1).

Based on the evidence of record, and bearing in mind that the Applicant bears a heavy burden to rebut the presumption that the District Council considered all relevant, accurate information in making the 1986 rezoning decision, the Hearing Examiner concludes that Figure 18 was not erroneous. The differences between the original Figure 18 and Mr. Perrine's revision can be explained as readily by reasonable differences in interpretation of the 1975 Soil Guide as by a failure to consult the Guide. Thus, while the original Figure 18 does not conform to the Applicant's preferred definition of environmentally sensitive areas, it represents the considered judgment of Technical Staff in 1985, and is vigorously supported by Technical Staff today.

2. Role of Figure 18 in 1986 Rezoning Decision

Technical Staff argued that even if Figure 18 had been presented to the District Council in the revised form Mr. Perrine prepared for this case, the decision to downzone the Subject Property would have been the same. Tr. Nov. 6 at 146-47; Nov. 7 at 64; Ex. 100 at 2. Staff contended that the

decision to classify the Subject Property under the RE-2C zone should be examined holistically, as it was in the Adopted Master Plan, considering all relevant attributes: streams, wetlands, steep slopes, soils, floodplains, storm water runoff, and wildlife habitat. Following this approach, Staff concluded that even if Figure 18 had been depicted as revised by Mr. Perrine, the District Council would have reached the decision recommended in the 1985 Galli memorandum (attached to Ex. 50), for the reasons stated at the conclusion of that memorandum:

“[T]he RE-2C zone should remain in place because the RE-2C zone better meets the following environmental objectives:

- Provides significantly greater open space area;
- Significantly reduces the density of development adjacent to existing wildlife habitat areas within the Seneca Creek State Park;
- Affords greater protection for the Long Draft Branch stream system without relying heavily on structural controls by virtue of having lower associated volumes of storm water runoff and non-point source pollution.”

The Applicant countered that even taking a holistic view, environmental conditions on the Subject Property did not warrant downzoning to RE-2C. The Applicant noted that Figure 32 of the Adopted Master Plan, which identified environmentally sensitive areas within the Gaithersburg Planning Area (fish sampling stations, wildlife habitat, waterfowl sanctuaries, unique vegetation and mature woodlands), identified no such resources on the Johnson Property. Exhibit 32 cites as its source the Seneca Creek/Muddy Branch Functional Plan and Associated Inventories, which are discussed in the next paragraph.

The Applicant notes that Technical Staff relied on text in the Adopted Master Plan stating that “[e]nvironmentally sensitive areas include aquatic and wildlife habitat, wetlands, mature woodlands, and unique vegetation. Both the *Functional Master Plan for Conservation and Management in the Seneca Creek and Muddy Branch Basins* (referred to as *Functional Plan*) and *Seneca Phase II Watershed Study* indicated various major areas recommended for protection.” The Applicant pointed out that neither the *Functional Plan* nor the *Watershed Study* identifies any environmentally sensitive

areas on the Johnson Property. What the Applicant failed to point out is that these plans identify *major* areas of environmentally sensitive resources, not every parcel of land containing any environmentally sensitive component. Technical Staff referred to these plans not as evidence of environmental conditions on the Johnson Property, which it was not their function to identify, but to support the argument that factors other than soil quality are important in identifying environmentally sensitive land. The *Functional Plan and Watershed Study* do, in fact, provide such support.

The Applicant also sought to undermine the importance of the Galli memorandum cited by Technical Staff (Ex. 104 at 6). The Applicant noted (as reported in the Technical Staff Report for this case) that the owners of the Johnson Property testified, at hearings on the 1986 SMA, that environmental conditions on the Johnson Property were not as severe as depicted in the Adopted Master Plan, and that the eastern portion of the property was less environmentally sensitive than the western side. The Johnson family also proposed a plan for R-200 development of the site. The Galli memorandum did not specifically address whether environmental conditions were accurately depicted in the Adopted Master Plan. Instead, it evaluated the likely impacts of development under the RE-2C Zone v. the R-200 Zone. The memorandum concluded that due to the effects of higher density -- a greater amount of impervious surfaces generating runoff, greater amounts of uncontrolled non-point source pollution, and significantly more clearing and grading -- development of the Johnson Property under the RE-2C Zone would better serve environmental objectives. The memorandum did state that the proposed R-200 development plan was "environmentally sound," but nonetheless opined that RE-2C development would be preferable.

The record does not make clear whether the entire text of the Galli memorandum was presented to the District Council when the SMA at issue here was under consideration. There is no dispute that at least the memo's conclusions, reprinted on the previous page, were presented to the District Council in a memorandum from the Planning Board. Technical Staff's argument concerning the

impact of Figure 18 depends only partially on the Galli memorandum, and most heavily on the portion of it that clearly was presented to the District Council. Moreover, the existence and context of the memorandum indicate strongly that the issue of environmental conditions on the Johnson Property received considerable attention during the SMA process. Accordingly, the Applicant's contentions concerning the Galli memorandum do not persuasively undercut Technical Staff's position.

Finally, the Applicant argued at the hearing that if presented with Mr. Perrine's revision of Figure 18, the District Council would have perceived correctly that the environmental features of the Johnson Property were comparable to those of the Smokey Glen Study Area properties fronting on Route 28, which retained R-200 zoning. Accordingly, the District Council would have allowed the Johnson Property to retain R-200 zoning as well. This argument puts the spotlight on the Adopted Master Plan's inconsistent treatment of the decision to retain R-200 zoning on the properties fronting on Route 28. As shown in the excerpts reproduced earlier in this report, the summary at the beginning of the plan document describes the area that retained R-200 zoning as "not considered environmentally sensitive." The more detailed discussion of the Smokey Glen Study Area states that R-200 zoning was retained on those parcels because their character had "already been determined by existing or proposed development." The latter statement was a reference to pending preliminary plans that had been submitted for the Orchard Hills and Willow Ridge subdivisions. The Adopted Master Plan provides no indication as to which of the above explanations was more accurate.

An objective examination of the original Figure 18 and the Applicant's revision reveals the following relationships among the various parcels as to environmental conditions: the Smokey Glen Farm had the greatest proportion of environmentally sensitive land; the Johnson Property had a slightly lower proportion than the Smokey Glen Farm; the proportion of environmentally sensitive land on the current Orchard Hills property was comparable to the Johnson Property; and the current Willow Ridge property had the smallest proportion of environmentally sensitive land. These comparisons are true with

either version of Figure 18 – the original or the revision. They lead to the conclusion that the decision to rezone only the Smokey Glen Farm and the Johnson Property, leaving the remaining properties in the study area under R-200 zoning, was more likely a policy decision, based on pending preliminary plans, than a recognition of significant differences in environmental conditions. The evidence is clear that the District Council made a considered decision to reject higher density on the Johnson Property despite different treatment for adjacent properties.

Accordingly, I find that even if the Applicant's revision of Figure 18 had been presented to the District Council, the zoning decision would have been the same.

D. Public Facilities

The adequacy of public facilities would be legally relevant only if the District Council were to find that there was a mistake in the 1986 rezoning of the Subject Property. In that event, the District Council would be in the same position it was in before the 1986 rezoning: it would need to consider the appropriateness of zoning the Subject Property RE-2C or R-200. *See White v. Spring*, 109 Md. App. 692, 709 (1996). In light of the Hearing Examiner's recommendation to deny the rezoning presently requested, this report does not address the considerations that would be before the District Council under those circumstances. Nonetheless, in the interest of completeness, issues raised at the public hearing will be summarized briefly.

Persuasive testimony indicated that the Subject Property would be served adequately by public sewer and water. Testimony concerning school capacity was inconclusive. Considerable testimony focused on potential adverse effects of the proposed density increase on traffic conditions. Area residents opposed to the proposed rezoning testified that delays due to traffic congestion are substantial, particularly for residents seeking to exit Willow Ridge and turn left on Route 28. Willow Ridge residents expressed grave concern about the implications of the proposed development connecting to Route 28 via Carrington Hill Drive, which currently is an internal roadway in a closed subdivision.

Several residents argued that the connection proposed on the Illustrative Plan would create a cut-through from Route 28, through Willow Ridge, to the two schools located in the immediate vicinity (Thurgood Marshall Elementary and Ridgeview Middle School) and to Great Seneca Highway. This was predicted to lead to unbearable traffic conditions for local residents. The Applicant's traffic expert attempted to refute these allegations, but with limited success. The evidence at the hearing raised serious questions as to the validity of the opinion voiced by the Applicant's traffic expert that development with the proposed density increase would have no adverse effect on the local roadway network. Additional analysis would be warranted if the District Council were to consider granting the requested rezoning.

Residents also testified about the poor physical condition of local roadways within the subdivisions, particularly McDonald Chapel Drive. The evidence indicated that some of the local roads may be experiencing rapid deterioration due to weak underlying soils, exacerbating the potential effect on those roads of increased traffic from higher density development. Efforts by the Applicant's planning expert to refute the implication that roads in the proposed new subdivision would also be subject to rapid deterioration were partially successful. Additional analysis of this issue also would be warranted if the District Council were to consider granting the requested rezoning.

IV. SUMMARY OF TESTIMONY

The testimony is presented to include the applicant's case in chief, public agency representatives' comments, the opposition's case in chief, and the applicant's rebuttal.

A. Applicant's Case in Chief

1. Philip E. Perrine, project land use planner.

Mr. Perrine qualified as an expert in the field of land use planning. He first described the general location of the Subject Property and the surrounding neighborhood. He then compared aerial photographs of the Subject Property and the surrounding area from 1983 (around the time that the applicable master plan was prepared) and 1996 (Exs. 68 and 69). This comparison showed that since the

1986 adoption of the Master Plan, the Willow Ridge and Orchard Hills subdivisions have been constructed immediately south of the Development Site, and Thurgood Marshall Elementary School has been built north of the Development Site, as well as Quince Orchard High School and other development south of Route 28. McDonald Chapel Drive was extended through the Subject Property on an easement to provide access the elementary school. Mr. Perrine described the approved Natural Resources Inventory/Forest Stand Delineation (Ex. 72), which identifies basic environmental features of the property including steep slopes, floodplain, erodible soils, and forest stand. Mr. Perrine noted that the soils identified as having severe limitations on development on the approved NRI/FSD are so categorized based on the most recent Montgomery County soil survey, completed in 1995.

Mr. Perrine then discussed the zoning history of the Johnson Property. In 1958 the Johnson Property was zoned R-200 in a comprehensive rezoning. In 1974, R-200 zoning was reconfirmed following the 1972 *Gaithersburg Master Plan*. In 1985, a revised *Gaithersburg Master Plan* was adopted, recommending RE-2C zoning for the Johnson Property and the adjacent Smokey Glen Farm. The Adopted Master Plan describes the Johnson Property and the Smokey Glen Farm as environmentally sensitive areas containing floodplains, steep slopes and erodible soils. It recommends lower density zoning for those areas. The Adopted Master Plan includes Figure 18, which identifies environmentally sensitive areas -- steep slopes, wooded areas, and erodible and alluvial soils -- in the Smokey Glen Study Area. The Adopted Master Plan also includes Exhibit 32, entitled *Environmentally Sensitive Areas*, which identifies features such as wildlife habitat and mature woodlands throughout the planning area. On Exhibit 32, the Subject Property is not identified as environmentally sensitive area.

The County Council implemented the Adopted Master Plan through a Sectional Map Amendment (SMA) in early 1986, which stated that the Smokey Glen Study Area was approved primarily for residential cluster development at densities ranging from one-half to two acres to better

protect this environmentally fragile area. The SMA zoned the Smokey Glen Farm and the Johnson Property RE-2C, while leaving the remainder of the Smokey Glen Study Area in the R-200 Zone.

Mr. Perrine tracked the treatment of the Johnson Property through the development of the *Gaithersburg Master Plan* and related SMA. The staff draft of the Master Plan recommended downzoning the Johnson Property and the Smokey Glen area from one-half acre minimum lots to two-acre minimum lots (R-200 to RE-2C). It described the area as environmentally sensitive, with floodplains, steep slopes and erodible soils. It also noted that a subdivision plan for 133 homes had been submitted for the Willow Ridge subdivision now located just south of the western half of the subject site. The recommendation for RE-2C zoning covered the Johnson Property, the Smokey Glen Farm, and the area now developed as Willow Ridge. The staff draft also identified an Area 12A, which was essentially the Smokey Glen Farm, and Area 12B, comprising the Johnson Property and the Willow Ridge area. The draft stated that Area 12A was at least 25% covered by serious site-constraining conditions, while Area 12B had some floodplain and erodible soils, suggesting that cluster development would be appropriate.

The preliminary draft of the *Gaithersburg Master Plan* prepared by the Planning Board divides up the area slightly differently. It designated an Area 2, comprised of the Smokey Glen Farm and the Johnson Property, and an Area 3, consisting of the properties fronting on Route 28. The preliminary draft recommended reconfirming R-200 zoning for the property fronting on Route 28. It recommended rezoning the Johnson Property and the Smokey Glen Farm to RE-2C for environmental protection purposes. Mr. Perrine pointed out one distinction between the staff draft and preliminary draft, which is that the floodplain map included in the staff draft was not part of the preliminary draft.

The final draft of the *Gaithersburg Master Plan* submitted to the District Council did not have specific depictions of floodplains or steep slopes, nor did it have an exhibit identifying soils with severe limitations. Mr. Perrine contrasted this with the level of environmental documentation contained

in other Montgomery County master plans that were adopted both before and after the *Gaithersburg Master Plan* was adopted. He listed five different master plans (Germantown, Olney, Potomac, Damascus and Clarksburg, *see* Ex. 82), all of which contained figures describing development constraints based on soil conditions, and ranking those constraints as severe, moderate and slight. Mr. Perrine stated that the *Gaithersburg Master Plan*, both in final draft presented to the Council and as adopted, lacked such a characterization of soil conditions. The lack of such data forms part of the basis for the mistake alleged by the Applicant in seeking this rezoning.

The staff draft of the *Gaithersburg Master Plan* that was considered by the Planning Board did contain a drawing that identified soil with severe limitations. However, no such drawing was included in the final draft presented to the Council or in the Adopted Master Plan. (Mr. Perrine apparently was unaware that this drawing was included in a Technical Appendix to the Adopted Master Plan.) Mr. Perrine hypothesized that if a soil interpretation methodology similar to that used in other master plans had been used in the case of Gaithersburg, Figure 18 in the Adopted Master Plan would show a smaller amount of environmentally sensitive soil.

Mr. Perrine described in some detail a document published by the SCS in 1975, called the *Soil Interpretation Guide for Urbanizing Areas* (the "Guide"). While the Soil Survey was intended primarily for agricultural purposes, the Guide was designed for use by planners, engineers, builders, government agencies and individuals owning or managing land. It interprets the Soil Survey results by indicating whether specific soils have slight, moderate, or severe limitations for the construction of buildings. Mr. Perrine stated that in general, buildings are not constructed in areas with severe soil limitations. In his view, only soils with severe limitations (based on the Guide) should be considered environmentally sensitive for development purposes.

Mr. Perrine used the Guide and the Soil Survey to create a hypothetical, revised version of Figure 18 in which the soils identified as erodible and alluvial consist of only soils that have a severe

limitation on development according to the Guide. Mr. Perrine testified that the soils identified as environmentally sensitive on the original Figure 18 mistakenly included both soils with severe limitations on development and soils with moderate limitations. In his judgment, soils with moderate limitations on development should not have been classified as environmentally sensitive. The revision of Figure 18 created by Mr. Perrine shows a much smaller area of environmentally sensitive soils than the original Figure 18. Mr. Perrine hypothesized that if the Council had had before it his version of Figure 18, it would have reached a different conclusion as to whether the Johnson Property had enough environmentally sensitive land to justify downzoning. Mr. Perrine estimated that the original Figure 18 from the Adopted Master Plan showed roughly 61% of the Johnson Property as environmentally sensitive, while his revision of Figure 18 shows about 28% of the Johnson Property as environmentally sensitive.

Mr. Perrine then turned to the question of whether the rezoning requested by this application would be warranted, assuming that the existing zoning is found to be predicated on a mistake. He noted that the Applicant is requesting rezoning for the portion of the Johnson Property with the least amount of environmental constraints. The requested rezoning would leave the western portion of the Johnson Property, where the flowing creek, the two ponds, and most of the steep slopes are located, in the RE-2C Zone. The requested rezoning would shift the northeastern portion of the Johnson Property from one residential zone up one level to a higher density residential zone. Mr. Perrine opined that in comparison with adjacent land that remained in the R-200 Zone when the Johnson Property was downzoned, the Subject Property has proportionately equal or less land that should be considered environmentally sensitive. He also compared the Subject Property to two other small subdivisions contiguous to Seneca Creek State Park that have been developed under the R-200 Zone (*see* Ex. 86). Both properties contain a type of soil that is present on the Subject Property, and that Mr. Perrine believes should not have been characterized as environmentally sensitive on the original Figure 18. He

cites these two subdivisions to support his contention that if the District Council had been given correct information as to the soil quality on the Subject Property, it would have permitted the site to be developed under the R-200 Zone. On cross-examination, Mr. Perrine conceded that the maps of these subdivisions depict only soil conditions and no other environmental constraints that may have existed. The Hearing Examiner notes, furthermore, that one of the two subdivisions has *no* soil with severe building limitations, and the other appears to have only a very small proportion of severely limited soil. Thus, even as to soils, these subdivisions present far less environmental challenge than the Subject Property.

Mr. Perrine testified that assuming the maximum allowable density, combined R-200/RE-2C development of the Development Site would yield a density of 1.4 dwelling units per acre. This compares to an average density of 2.4 dwelling units per acre in the two adjacent subdivisions fronting on Route 28 (Orchard Hills and Willow Ridge).

Mr. Perrine also described an Illustrative Plan for the Development Site with combined RE-2C and R-200 zoning (Ex. 87), reproduced in Part II of this Report, which shows the most environmentally sensitive portions of the site remaining in the RE-2C Zone. It shows the higher density R-200 zoning in the central portion of the site, between the areas that all parties agree are environmentally sensitive. This Illustrative Plan is not binding on the Applicant; it is merely a potential development concept. The Illustrative Plan also shows the internal roadway network that would connect the proposed subdivision to the Willow Ridge subdivision to the south and the Quince Orchard Manor subdivision to the north. It shows development of 80 dwelling units, including Multi-Family Dwelling Units (MPDUs).

Mr. Perrine clarified on cross-examination that he does not consider any aspect of Figure 18 incorrect other than the characterization of soils as environmentally sensitive.

On questioning by the Hearing Examiner, Mr. Perrine further clarified that it is common practice in the building industry to build on soil with slight or moderate limitations on development. He stated that in general, building does not take place on soil with severe constraints. He noted that in an urbanized area, soil with such constraints can be removed and other soil brought in. However, in a developing area where one of the objectives is to avoid environmentally sensitive areas, building generally does not occur on soil with severe constraints. Nevertheless, in some cases building has occurred on soil with severe constraints in this area of Montgomery County. He also noted that the proposed plan would be developed under the cluster method, so a site plan would be required in addition to subdivision approval. Both of these steps would involve additional review by relevant public agencies of the subdivision plan and its impact on soils.

Mr. Perrine noted that development under the R-200 Zone today would be governed by stricter environmental regulations and best management practices than those in place in 1985. He suggested that if stricter regulations had been in place in 1985, particularly with regard to stormwater management and forest conservation, greater mitigation would have been possible and perhaps the zoning would not have been changed.

2. Stephen Tawes, project civil engineer.

Mr. Tawes testified based on his supervisory role in developing the stormwater management proposed for the Development Site. He also testified that public sewer and water facilities are readily available to service the proposed development.

Mr. Tawes stated that a preliminary plan of subdivision (reproduced in Part II of this Report) has already been submitted for the entire Development Site under the RE-2C zoning classification, for use if the proposed rezoning is not granted. He testified that a stormwater management plan proposed in connection with that preliminary plan has been approved. He explained that the project would not use the existing ponds on the site for stormwater management, because they

are not technically suitable. Instead, stormwater management is to be provided outside the environmental buffer surrounding the stream valley, on each side of the buffer. He opined that a stormwater management program could be developed that would accommodate R-200 zoning without adverse environmental impact.

On cross-examination by a community member in opposition, Mr. Tawes acknowledged that a portion of the proposed development would be on low-lying land, possibly lower than the Willow Ridge subdivision, where most of the houses have grinder pumps to pump sewage out of the homes up to the main sewage line. Mr. Tawes testified that none of the sewage lines planned for the Development Site would connect to the Willow Ridge sewer lines. Instead, they would connect to facilities located on McDonald Chapel Road. Mr. Tawes declined to agree with the questioner's statement that grinder pumps are environmentally hazardous. He acknowledged that any stormwater management plan for the site would require appropriate approvals.

3. Wes Guckert, traffic and transportation planner.

Mr. Guckert has performed a traffic impact analysis for the proposed development. His analysis indicates that with roadway improvements recommended by the Applicant, the traffic generated by the proposed development would be mitigated to the point that the critical lane volume would be lower than the regulatory ceiling. The proposed improvements would be funded by the project developer, either alone or in participation with other developers. Mr. Guckert considers these improvements likely of fruition in the foreseeable future. He opined that by virtue of his study, as well as review by County planning staff and the State Highway Administration, the proposed development with the suggested improvements would not have an adverse effect on the transportation network. Moreover, the transportation network for the project would be safe, adequate and efficient.

There was considerable discussion on cross-examination concerning the timing of Mr. Guckert's traffic observations, which were conducted on June 5 and 6, 2001, after the senior class had

been dismissed for the year at the nearby Quince Orchard High School. Community members suggested strongly that the timing of this study called into question its conclusions, given that the senior class included one-quarter of the school's occupants, and those most likely to drive their own cars. Mr. Guckert's testimony on cross-examination revealed that he was not aware of when the senior class was dismissed for the year, nor was he aware that most extra-curricular activities at the high school end between 5:00 and 6:00 p.m., but had already ended for the school year when his counts were taken. Mr. Guckert was steadfast in his view that student activities would not have a meaningful impact on traffic counts. He stated nonetheless that if the project proceeds, an additional traffic study will be conducted prior to submission of a subdivision plan, and he would be sure to do that study at a time when all classes are in session.

Mr. Guckert testified on cross-examination that his traffic analysis in this instance did not take into consideration the effect of approaching left-hand turns, which sometimes lead to delays. He was questioned in particular about the potential impact of the proposed development on residents of Willow Ridge seeking to exit onto Route 28. Currently Willow Ridge is a closed development, i.e., traffic can enter and exit the subdivision only from Route 28. The Applicant proposes creating the possibility for thru traffic to proceed from Route 28 through Willow Ridge to a new road into the subdivision that would be created on the Development Site. Traffic would then be able to proceed along McDonald Chapel Drive to other local streets and eventually to Great Seneca Highway. Project opponents hypothesize that creating the possibility of this cut-through would lead to substantial amounts of traffic leaving Route 28 to cut through the neighborhood on the way to Great Seneca Highway, rather than sitting at several traffic lights along Route 28 and Quince Orchard Road. Mr. Guckert conceded that if a substantial amount of traffic sought to cut through Willow Ridge in this manner, traffic trying to leave Willow Ridge and proceed east on Route 28 (turning left) would be delayed. Mr. Guckert maintained, however, that he felt it unlikely that many drivers would consider this to be an efficient or

attractive cut-through route. This conclusion was hotly contested by several community members who pointed out that the potential cut-through route would not only provide access to Great Seneca Highway, but on the way would provide access to an elementary school and a middle school.

Mr. Guckert also responded to questioning as to why an earlier plan presented to the community had been dropped. That plan showed a roadway extending due south from the center of the Development Site, through the southern portion of the Johnson Property, accessing Route 28 directly without passing through Willow Ridge. Mr. Guckert testified that the distance between Quince Orchard Road and the roadway out of Willow Ridge is not long enough for the State Highway Administration to allow an additional intersection to be created, particularly with signalization or a dedicated turn lane. He further stated that although connecting nearby neighborhoods has many benefits from a traffic and transportation planning perspective, a new plan could very likely be designed, subject to approval of the Planning Board, that would avoid connecting the new subdivision to Willow Ridge.

Mr. Guckert conceded on cross-examination that the roadway improvements proposed by the Applicant currently are not binding obligations. These improvements, potentially with changes recommended by the State Highway Administration, would become binding obligations at the subdivision stage.

4. Stephen Nardella, representative of Winchester Homes.

Winchester Homes has been the contract purchaser of the Johnson property for approximately two years. Mr. Nardella is a certified urban planner with 20 years of experience in land development, and supported the Applicant's environmental analysis. He stated that the Master Plan's goals of environmental protection, including wildlife and park buffer, could have been sustained by keeping the R-200 zoning classification in place. He suggested that the County's decision to build an elementary school adjacent to Seneca Creek State Park belies the contention that it has serious concerns about environmental protection in this area.

Mr. Nardella testified that the proposed development would serve the public interest by creating a very high quality community of single-family residences located within walking distance of three schools, with close-by shopping services and a beautiful state park. The proposed development would also be compatible with existing adjacent development. Making more housing available in a central location in the County, closer to employment sites, decreases vehicle miles traveled overall. In addition, twenty-four lots on 90 acres of land (the maximum under current zoning) would not result in affordable housing. The immediate neighborhood might enjoy having \$500,000 homes on that 90 acres, but it would do less to meet the housing needs of Montgomery County as a whole than would 80 homes on the same parcel. Furthermore, under the RE-2C plan there would be no moderately priced housing; with the Subject Property under R-200 zoning, the developer would have an obligation and a desire to provide a certain percentage of moderately priced dwellings. Environmental concerns would be met by complying with all of the relevant governmental regulations.

B. Testimony by Public Agency Representatives

1. Seekey Cacciatore, M-NCPPC Environmental Planning Division.

Ms. Cacciatore is an Environmental Planner with the M-NCPPC. She argued that the original Figure 18 in the Adopted Master Plan was accurate – that it correctly depicted the area of environmentally sensitive soils. She based this on her analysis of the 1961 Soil Survey and the 1975 Soil Interpretation Guide. She pointed out several categories of soils located within the Subject Property that are described in the Guide as severely eroded or very severely eroded. Some of these are described in the Guide as having severe constraints on development and others as having moderate constraints. Nonetheless, Ms. Cacciatore maintained that all could reasonably be interpreted as environmentally sensitive areas.

Ms. Cacciatore responded to the claim that the District Council was not given adequate information on soil limitations by referring to the Technical Appendix to the Adopted Master Plan, which included a map identifying “severely limited soils.”

Ms. Cacciatore also cited a memorandum written in 1985 by M-NCPPC staff member John Galli in response to the Johnson family’s objection in late 1985 to RE-2C zoning on the property (Attachment to Ex. 50). That memorandum recommended RE-2C zoning for the Johnson Property to protect the quality of the stream running through the site, as well as open space and wildlife habitat.

In addition, Ms. Cacciatore rejected the Applicant’s contention that R-200 zoning is more appropriate with today’s stormwater management and best management practices. She stated that stormwater management and best management practices control only 70% of runoff from a development, so development at R-200 density would risk harming the integrity of the stream, regardless of the controls put in place. She opined that the downzoning in 1986 was a result of examining the Smokey Glen area in a holistic way, looking at steep slopes, soils, streams, stream buffers, wetlands, floodplains and forests, not exclusively focusing on soils. She also opined that the reason only a portion of the Smokey Glen Study Area was downzoned to RE-2C was that preliminary plans had already been submitted for the areas contiguous to Route 28 that now house the Willow Ridge and Orchard Hills subdivisions. She characterized it as a policy decision by the District Council not to downzone those areas, even though they included some environmentally sensitive land.

On cross-examination, Applicant’s counsel persuaded Ms. Cacciatore to concede that the Adopted Master Plan does not refer to previously filed preliminary plans of subdivision as the reason the land fronting on Route 28 was not downzoned. He accomplished this by showing Ms. Cacciatore the “Plan Highlights” on page four of the Adopted Master Plan, which state that the properties fronting on Route 28 were allowed to remain in R-200 zoning because they were not considered environmentally sensitive. The Hearing Examiner notes that text on page 50 of the Adopted Master Plan describes the

Smokey Glen Study Area in more detail, and states explicitly that “the character of these parcels [fronting on Route 28] has already been determined by existing or proposed development.” Thus, the Adopted Master Plan contains inconsistent statements on this point, and can be used to support either the Applicant’s or Technical Staff’s preferred explanation for the District Council’s decision.

Ms. Cacciatore explained further, on cross, that she believes the original Figure 18 accurately depicted environmentally sensitive areas because it considered not only the soil information in the Soil Survey and Guide, but also whether a particular area was included within the stream valley buffer or was located on a steep slope within a certain distance of the stream valley. While certain soils were characterized in the Guide as having moderate constraints, those constraints became severe when located in conjunction with other environmental features.

Ms. Cacciatore also discussed the 1985 Galli memorandum in more detail, noting that it discussed forest conservation with respect to open space. Under the RE-2C Zone, forestation and conservation thresholds would be 20% and 25%, while under the R-200 Zone those would drop to 15% and 20%, respectively. As a result, there would be less open space with development under the R-200 Zone. Preservation of open space was one of the objectives stated in the Galli memorandum. Ms. Cacciatore also stated that stormwater management would be substantially more difficult to achieve under the R-200 Zone than under the RE-2C Zone.

2. Nellie Shields Maskal, planner, M-NCPPC Community-Based Planning Division.

Ms. Maskal testified that she participated in the 1985 hearings on the rezoning of the Johnson Property. She stated that the owners of the property actively participated in hearings before the Planning Board and argued that environmental conditions on the site did not warrant classifying it under the RE-2C Zone. Their concerns were related to environmental constraints in general, not specific soil conditions. There also was discussion about the environmental objectives of the Master Plan.

C. Opposition's Case in Chief

1. Mary Ann (Mitzi) Kosciulek.

Ms. Kosciulek resides in the vicinity of the Subject Property. She offered her opinion that RE-2C is the correct zone for the Subject Property. The existing zoning helps meet the Master Plan objectives of providing greater open space, reducing stormwater runoff, and reducing density of development adjacent to the wildlife preserve. She also noted that a recent boundary change affecting the local elementary school will put that school over-capacity, without considering new homes on the Subject Property. This would also impact the middle school and the high school. Obviously 24 homes would have less impact than 91 homes.

2. Philip Martinez.

Mr. Martinez lives in Orchard Hills. He commented on the need to preserve low-lying land that may contain wetlands and alluvial soils, to buffer sensitive environmental resources.

3. Paul Murphy.

Mr. Murphy also resides in the vicinity of the subject site. He offered into evidence a number of photographs of the site and adjacent properties. He noted that many trees currently on the Subject Property would have to be cut down to accommodate higher density development. He stated that he had purchased his house in part in reliance on the fact that the adjacent property was zoned for two-acre lots. He also opined that lower density development would provide a better buffer for Seneca Creek State Park. In addition, stormwater runoff would have less impact with lower density. Mr. Murphy noted, in addition, that the subject site is at a higher elevation than some of the neighboring communities. This difference in topography creates a concern about water runoff and its impact on houses at lower elevations. He strongly advocated maintaining the existing zoning because it allows reasonable development without endangering the environment.

On cross-examination, Mr. Murphy agreed that the Orchard Hills subdivision was depicted on Figure 18 with significant environmental features. Mr. Murphy maintained, however, that the most environmentally sensitive part of Orchard Hills is the stream valley, where there is no development. He also noted that some of the roads through the subdivision have problems with deterioration, including McDonald Chapel Road. He added his opinion that if the possibility of a cut-through using Willow Ridge is created, many residents of Willow Ridge will take the opportunity to use McDonald Chapel Road because even under current conditions it is extremely difficult to exit the development onto Route 28. This would increase traffic on McDonald Chapel Drive, worsen road conditions, and increase the back-up at McDonald Chapel Road and Route 28.

Mr. Murphy also submitted correspondence dated April 5, 2001, opposing the proposed rezoning due to expected adverse effects on the environment, traffic, sewage and drainage systems, and quality of life.

4. Larry Regan.

Mr. Regan lives in Orchard Hills and opposes the application on environmental and traffic grounds. He echoed concerns raised by other area residents about traffic buildup and deteriorating road conditions on McDonald Chapel Drive. He voiced environmental concerns, stating that Orchard Hills has visibly damaged the stream running through it. Siltation has built up and reduced the quality of the streambed environment. Mr. Regan is also concerned that higher density development would remove more wildlife habitat and exacerbate neighborhood's problems with deer and other wildlife feeding in residential gardens.

Mr. Regan submitted a letter, dated June 7, 2001, by which he transmitted data concerning pending boundary change proposals for the local elementary school cluster that could push enrollment at Thurgood Marshall Elementary School to capacity. These proposals do not take into account the proposed rezoning. See Ex. 53. Mr. Regan also submitted a letter dated May 14, 2001,

which voice opposition by himself and his wife due to expected adverse impacts on the local school system, traffic, the environment, and sewage and drainage systems. *See* Ex. 33.

5. Paul Foringer.

Mr. Foringer testified that he has lived in the Willow Ridge development for about 15 years. During the first five years there were no traffic problems. As development began to increase along the corridor, traffic problems developed for residents of Willow Ridge. At the present time, residents trying to leave the community and make a left-hand turn going south on Route 28 generally cannot get out unless traffic backs up all the way from the light at Quince Orchard Road to a standstill. The State Highway Administration currently has a major reconstruction of Route 28 underway. Mr. Foringer has worked with the planners of that project over the last 10 years looking for a way to improve access for Willow Ridge residents. The current plan is to construct a six-foot median in the center of Route 28 in the middle of the four lanes of traffic. That would allow traffic exiting Willow Ridge to cross over two lanes of traffic and sit in the median while waiting for a safe opening to proceed southward. Mr. Foringer reported that his contact at the State Highway Administration told him quite directly to fight any proposal to connect Willow Ridge to the development planned on the Subject Property -- the planned median would be useless with the roadway connection that the Applicant currently proposes.

Mr. Foringer also stated that testimony during the hearing about soil conditions has given him new insight into the condition of roads in his development, which have cracks running all the way through them. The same conditions are visible on McDonald Chapel Drive. Based on the various exhibits presented at the hearing, it appears that some of these roads were built on soils with severe development constraints. One house in his neighborhood has actually subsided so far that the house had to be rebuilt. He is very concerned about the ability of the local roads to withstand additional traffic,

particularly school buses that would use Willow Ridge as a cut-through if that possibility were created. Mr. Foringer has much less concern about the prospect of 24 homes than about 80 or 90 homes.

6. Michael Lehrhoff, Co-President of Orchard Hills Homeowners Association.

Mr. Lehrhoff testified that the Applicant has not met its burden of proof to overcome the presumption of correctness of the comprehensive zoning in this case. He characterized the issue of soil quality raised by the Applicant as barely more than a footnote compared to numerous other environmental issues that were more fundamental to the decision to downzone the Subject Property to RE-2C. Moreover, the Applicant's contention that the soil information provided to the District Council was incorrect is the subject of conflicting testimony. Mr. Lehrhoff argued that by raising one minor issue with inconclusive evidence, the Applicant is far from meeting the requisite legal standard for overturning a legitimate zoning action.

Mr. Lehrhoff also cited the diligent efforts of the three homeowners associations involved in this case to preserve their neighborhood. He cited the number of letters received and people participating in the hearing as an indication of the community's level of concern. Mr. Lehrhoff's testimony was also reflected in correspondence from him dated October 18, 2001 (Ex. 60).

Mr. Lehrhoff's co-President at the Orchard Hills Homesowners Association, Mark Brandsdorfer, also submitted a letter, dated May 29, 2001, which analyzed the relevant legal issues in some detail (Ex. 48). Mr. Brandsdorfer argued that the Applicant stated no grounds for a finding of mistake, and that even if there were a mistake, the requested rezoning would not rectify the mistake and would be counter to the public interest. He also described concerns about the local school system, sewage and drainage systems, traffic, physical conditions of local roads, and quality of life.

7. Marjorie Murphy.

Ms. Murphy resides in Orchard Hills. She submitted into evidence a hand-drawn diagram depicting patches, cracks, curb sinking and road sinking along McDonald Chapel Drive. She

suggested that the condition of this roadway, built in 1988, may indicate something about the quality of the soil underlying it.

8. Liz Lawrence, representing Willow Ridge Homeowners Association.

Ms. Lawrence has lived in Willow Ridge since 1986 and has witnessed the growth in the area. She testified that listening to the testimony in this case concerning soil conditions gave her new understanding of some of the problems in her subdivision. When Willow Ridge was built, some MPDUs were constructed right over a stream. This results, not surprisingly, in wet basements for the residents of those buildings. She described the roads in the subdivision as having fissures, not just cracks. In addition, she is concerned that the delicately balanced grinder pump sewage system in Willow Ridge could be thrown off-balance by additional sewage flowing into their system from a new subdivision. All of these problems would certainly be exacerbated by having 91 homes instead of 24 on the Development Site. Ms. Lawrence also commented about a high level of wildlife activity in her backyard, including deer, foxes, and skunks. On cross-examination she conceded that she did not know of any effect on the wildlife population from the development of the elementary school, which is a significant generator of activity and presumably removed a certain amount of wildlife habitat.

9. Ron Dietz.

Mr. Dietz is a resident of Orchard Hills. He testified concerning traffic conditions and his conviction that if the main road through Willow Ridge is available as a cut-through, people will certainly take advantage of it.

10. Correspondence in Opposition.

The record includes numerous letters received in opposition to this application, including 17 form letters opposing the rezoning request due to expected adverse effects on the environment; the local school system; local water, sewer, and storm water management systems; traffic; and quality of

life. These letters also noted that many residents of the nearby subdivisions purchased their homes in reliance on the existing RE-2C zoning on the Subject Property. Other letters are summarized below.

Douglas and Sara Watt, March 6, 2001, voiced concerns about water runoff and soil conservation; safety of people and structures in the event of blasting during construction; sewer system capacity; traffic; school crowding; road maintenance due to the impact of heavy construction vehicles; and removal of wildlife habitat exacerbating conflicts between human residents and deer.

Chang-Yang Li, April 10, 2001, expressed concern about significant impacts on traffic, schools, and the environment.

Luyuan Li, April 4, 2001, expressed concern about adverse effects on the environment and traffic.

D. People's Counsel

The People's Counsel participated in the questioning of witnesses. In addition, he offered a closing argument that identified salient points of evidence, including particular pages in the Technical Staff Report and the Galli Memorandum. Mr. Klauber also reviewed the standards established under relevant case law for the "mistake" theory in Maryland zoning law. He concluded that while the Applicant had presented masterful testimony, it did not succeed in rebutting the presumption that the most recent comprehensive zoning of the Subject Property was correct.

E. Applicant's Rebuttal

Philip E. Perrine.

Mr. Perrine sought to rebut the testimony of Seekey Cacciatore. First, he presented an enlarged version of the map that was in the staff draft of the Master Plan showing the location of soils with severe development constraints. Mr. Perrine testified that this appears to be the same map that was available in the Technical Appendix to the Adopted Master Plan. In analyzing the enlarged map, Mr. Perrine opined that the area of severely limited soils shown on that map is virtually identical to the one

shown on his revision of Figure 18, which was based on his interpretation of the 1975 Soil Interpretation Guide.

Mr. Perrine also testified that none of the soils on the Subject Property that the Guide classified with moderate development constraints were close enough to steep slopes to justify considering them environmentally sensitive. He reiterated that the staff draft of the Master Plan had included the Johnson Property and the properties facing Route 28 in a single area described as having lesser environmental constraints than the Smokey Glen Farm, but the accurate information in the staff draft was not passed on to the District Council in later drafts.

Mr. Perrine also addressed the importance or lack thereof of the 1985 staff memorandum written by John Galli. He noted that this memo was written in response to testimony by the owners of the Johnson Property that their property was not as environmentally sensitive as the Smokey Glen Farm property. The Galli memo described a plan proposed at that time to develop the Subject Property under the R-200 Zone as environmentally sound; the memo merely concluded that development under the RE-2C Zone would be *more* environmentally beneficial. Mr. Perrine hypothesized that the Galli memo contained little discussion of soil because soil conditions on the Subject Property are not a big concern. The Galli memo describes the soils on the site, other than the wet soils in the creek, as well-drained and moderately deep to deep, which are good soils for development. Moreover, Mr. Perrine indicated that he could not find a copy of the Galli memo in the materials that were presented to the District Council at the time of the rezoning. He testified that the memo was used by staff and was presented to the Planning Board and described to members of the Council's Planning, Housing and Economic Development Committee. The three main bullet items presented at the end of the Galli memo (quoted in Part II of this Report) were contained in a Planning Board memorandum that was provided to the Council.

With regard to stormwater runoff, Mr. Perrine noted that while the proposed change in zoning on the Subject Property would result in developing 66 additional units, R-200 zoning resulted in

111 additional units in Willow Ridge, and 127 additional units in Orchard Hills. The additional runoff from those properties was not sufficient to warrant downzoning them to the RE-2C Zone. In addition, current stormwater regulations require that post-development runoff be comparable to pre-development runoff. That regulation was not in place at the time of the rezoning at issue here, but it will protect the creeks whether the property is developed under RE-2C or R-200.

Mr. Perrine also sought to rebut evidence suggesting that roadway conditions in nearby subdivisions are indicators that roads in the proposed development would be susceptible to rapid deterioration. He noted that several of the roads where residents identified structural problems are located on soils that the Soil Survey and the Guide identified as having severe constraints on development. In contrast, the Subject Property has a great deal of land that is not on soil with severe development constraints and is very appropriate for development.

V. ZONING ISSUES

This application involves a request to rezone property classified under a Euclidean zone, which in Maryland requires evaluation under a judicially created doctrine known as the “change-mistake” rule, first established by the Court of Appeals of Maryland in *Northwest Merchant Terminal, Inc. v. O'Rourke*, 191 Md. 171, 60 A.2d 743 (1948). The Applicant must show either substantial change in the character of the zoning neighborhood, or mistake in the last comprehensive zoning. If the Applicant succeeds in demonstrating change or mistake, the District Council is permitted, but not required, to grant the proposed rezoning. The application filed in the present case sought rezoning based on both change and mistake. However, the Applicant proceeded at the hearing only under the mistake doctrine. Thus, the question presented is whether the District Council “committed actual and basic ‘mistake’ or ‘error’ as those interchangeable terms are used in zoning law, when it adopted” the SMA that zoned the Subject Property RE-2C. *Howard County v. Dorsey*, 292 Md. 351, 353, 438 A.2d 1339

(1982); *People's Counsel for Baltimore County v. Beachwood I Ltd. Partnership*, 107 Md. App. 627, 640, 670 A.2d 484 (1998); *Boyce v. Sembly*, 25 Md. App. 43, 44, 334 A.2d 137 (1975).

Maryland's highest court "has repeatedly recognized that there is a strong presumption of the correctness of comprehensive rezoning, and that 'strong evidence' of error is required to overcome that presumption." *Dorsey*, 292 Md. at 355; *Beachwood*, 107 Md. App. at 640; *Boyce*, 25 Md. App. at 49. This presumption is normally accorded to comprehensive zoning as a safeguard against later attempts to rezone individual parcels in a haphazard manner that threatens the underlying public policies of the comprehensive zoning. A rezoning request can be granted based on mistake only if strong evidence of error makes the question of mistake fairly debatable; if the evidence put forth by the proponent of rezoning is not strong enough to raise a fairly debatable question as to whether a mistake occurred, the zoning authority may not grant the requested rezoning. See *Dorsey*, 292 Md. at 356.

A mistake is said to exist when strong, probative evidence shows that:

- (1) assumptions or factual premises relied upon by the zoning authority at the time of comprehensive zoning were invalid;
- (2) facts, projections, trends or needs reasonably anticipated at the time of comprehensive zoning were ignored; or
- (3) subsequent events demonstrate that initial assumptions or premises relied upon were invalid.

Dorsey, 292 Md. At 356-57, citing *Boyce*, 25 Md. App. at 50-53; see also *Beachwood*, 107 Md. App. at 645-46.

The courts have emphasized that to justify rezoning, a mistake must be basic and actual. It must relate to the adequacy and accuracy of factual premises or assumptions actually relied upon. See *Beachwood*, 107 Md. App. at 645; *White v. Spring*, 109 Md. App. 692, 698, 675 A.2d 1023, cert den'd, 684 A.2d 455 (1996). Mistake is *not* demonstrated by evidence that a zoning authority used bad

judgment; the change-mistake doctrine is designed to allow mistakes to be corrected, not to provide individual property owners with the means to second-guess comprehensive zoning decisions. *See Beachwood*, 107 Md. App. at 645.

The Applicant in the present case argues that the District Council relied on incorrect information presented in Figure 18 of the Adopted Master Plan, and in so doing failed to consider relevant information from the 1975 Soil Interpretation Guide. No evidence was placed in the record showing specific reliance by the District Council on Figure 18. However, given that the Adopted Master Plan contained a limited amount of information on environmental conditions in the Smokey Glen Study Area, I will assume, for purposes of this analysis, that the District Council acted in part in reliance on Figure 18.

Based on a thorough review of the evidence of record, I find that the Applicant has failed to meet its burden of presenting strong evidence that Figure 18 failed to incorporate relevant information from the Soil Interpretation Guide or was otherwise incorrect. The documentary evidence submitted by the Applicant to demonstrate the inaccuracy of Figure 18 was unpersuasive, and opinion evidence, even from an expert as well-respected as Mr. Perrine, "is not evidence strong or substantial enough to show error unless the reasons given, or other supporting facts relied upon, are themselves substantial and strong enough to show error." *Dorsey*, 292 Md. App. at 359; *Beachwood*, 107 Md. App. at 650. Here, no such substantial and strong reasons or supporting facts were presented. In fact, some of the evidence presented by the Applicant could be interpreted to support Technical Staff's position.

This analysis need go no further to support my recommendation that the instant rezoning application be denied. Nonetheless, in light of the substantial amount of evidence presented concerning the role of Figure 18 in the downzoning complained of here, it seems appropriate to address that question as well.

The Applicant failed to present strong evidence that, even if Figure 18 were considered incorrect, this inaccurate information led the District Council to make a mistake. Instead, the evidence tends to show that even if the District Council had had before it the revision of Figure 18 proposed by the Applicant, it would have made the same decision to downzone the Subject Property. There is not a shred of evidence to indicate that the District Council based its decision specifically on soil conditions. Evidence presented concerning the SMA process – including testimony by the Johnson family, Master Plan references to a variety of sensitive environmental resources, evidence that R-200 zoning was retained on other properties because of pending preliminary plans, and Planning Board recommendations based on the Galli memo – showed, on the contrary, a strong likelihood that the District Council based its decision on a number of factors related to environmentally sensitive areas. Most of these factors would have been unaffected by any inaccuracy in the characterization of soils on Figure 18.

Finally, I note that if the District Council were to find that a mistake occurred in the SMA that downzoned the Subject Property, a decision to grant the rezoning requested in this application would be permitted, not required. The District Council would have the responsibility to consider whether the requested rezoning would be the appropriate remedy for the mistake and would serve the public interest. *See White*, 109 Md. App. at 707-709.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire evidence of record, I reach the following conclusions:

1. The Applicant has not introduced strong evidence probative of its contention that the District Council relied on inaccurate information in Figure 18 of the *Approved and Adopted 1985 Gaithersburg Master Plan* and therefore committed error in approving

SMA G-502, which reclassified the Subject Property from the R-200 Zone to the RE-2C Zone.

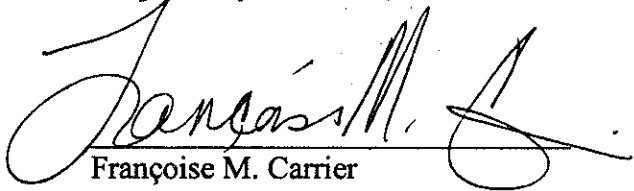
2. The Applicant has not overcome the presumption of validity accorded to the SMA.
3. Granting this application would not be in accord with the public interest.

VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-789, for the reclassification from the RE-2 Zone to the R-200 Zone of a total of 32.930 acres located in the northwest quadrant of the intersection of Quince Orchard Boulevard and Darnestown Road, Gaithersburg, in the 6th Election District, be *denied*.

Dated: March 29, 2002

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Françoise M. Carrier', is written over a horizontal line.

Françoise M. Carrier
Hearing Examiner

FMC:nzf